No. 25-906

In the
Supreme Court of the United States

E.D., a minor, by her parents and next friends,
MICHAEL DUELL & LISA DUELL;
NOBLESVILLE STUDENTS FOR LIFE,
Petitioners,

v.

NOBLESVILLE SCHOOL DISTRICT, et al.,
Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990); *Trump v. Anderson*, 601 U.S. 100 (2024); *McConnell v. FEC*, 540 U.S. 93 (2003); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), as well as amici. The ACLJ specializes in First Amendment litigation, and the rights of students at school. *See, e.g., Mergens* (representing Respondents); *Summum* (representing Petitioners); *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015) (as amicus). *See also Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (representing Petitioners). In *Mergens*, this Court held that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250. The ACLJ joins as *amicus* to urge this Court to protect that holding.

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[1] Per Rule 37.2, *amicus* states that counsel of record received timely notice of the intent to file this brief. Per Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no entity or person made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision below rests on a perception-based framework that this Court has repeatedly disfavored across its First Amendment jurisprudence. The "imprimatur" test applied below shares the central defect of the "reasonable observer" test found in *Lemon v. Kurtzman* and its progeny: both subject First Amendment rights to a heckler's veto of sorts, hinging a speaker's rights on the impressions of a hypothetical observer rather than on the fact of who is actually speaking.

Here, the student club posters at issue are plainly private speech. The Seventh Circuit, relying on *Kuhlmeier*, a case concerning a school-sponsored newspaper integrated into a credited journalism curriculum, extended *Kuhlmeier*'s "imprimatur" test to entirely different circumstances. This Court should grant review to clarify that the imprimatur test, to the extent it subordinates the actual facts to observer misperception, cannot justify stripping free speech protection from private speech.

This is not to say that *Kuhlmeier* should be overturned. A school newspaper produced within a credited journalism class, funded by the school, and subject to regular faculty and administrative review can qualify as government speech. In contrast, a bulletin board advertising dozens of student-initiated clubs spanning every viewpoint is a far cry from a government speech-producing program. The school has identified no legitimate pedagogical concern justifying the restriction of speech that was not produced in a class, not meaningfully supervised by faculty, and not connected to any curricular objective. This Court should grant review and reverse.

ARGUMENT

I. THE "IMPRIMATUR" TEST OF *KUHLMEIER*, LIKE THE "REASONABLE OBSERVER" TEST IN ESTABLISHMENT CLAUSE CASES, SHOULD NOT BE PERMITTED TO CREATE A HECKLER'S/OBSERVER'S VETO.

The First Amendment's protections do not depend on the impressions (or misimpressions) of a hypothetical bystander. A standard anchored in third-party perception is inherently unstable: different observers will perceive the same act differently and courts will disagree about what the hypothetical observer knows or assumes. This Court's experience with the "reasonable observer" test in Establishment Clause "endorsement" jurisprudence illustrates precisely these problems. *Kuhlmeier*'s imprimatur test, if extended beyond the context of curricular projects, risks producing the same problems, as the present case illustrates.

A. The Tests Are the Same: They Share History, Application, and the Same Key Flaw.

In the Establishment Clause context, Justice O'Connor's endorsement test, articulated in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), asked whether a reasonable observer would perceive a government action as endorsing religion. Around the same time, this Court extended analogous reasoning to government speech in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), permitting schools to restrict student speech that would "reasonably be perceived" to bear the school's imprimatur. Both tests

task courts with imagining how a hypothetical observer would react rather than examining the underlying facts of government involvement. *Cf. Kennedy v. Bremerton School District*, 597 U.S. 507, 534 (2022).

"[R]ather than fix *Lemon's* problems, this new gloss compounded them." *Shurtleff v. City of Boston*, 596 U.S. 243, 278 (2022) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring). Some argued that a reasonable observer was likely to fail to know or consider all relevant law and facts. *See*, *e.g.*, *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160-61 (10th Cir. 2010). But others argued that any credible reasonable observer should behave exactly as a judge or jury, considering all relevant legal principles and facts. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 778-781 (1995) (O'Connor, J., concurring in part). "And that suggestion only raised even more questions. Just how mistake-prone might an observer be and still qualify as reasonable?" *Shurtleff*, 596 U.S. at 279 (Alito, J., concurring).

While *Lemon*'s "reasonable observer" test was not explicitly invoked outside of Establishment Clause litigation, the same approach appears in *Kuhlmeier* and the present case. *Kuhlmeier* held that "[a] school must also retain the authority to refuse to sponsor student speech that might ***reasonably be perceived*** to . . . associate the school with any position other than neutrality on matters of political controversy." *Kuhlmeier*, 484 U.S. at 272 (emphasis added). This is essentially a "public perception" test that echoes the rejected *Lemon* cases.

Kuhlmeier, if extended beyond its context of actual school-organized, curricular, speech-generating

programs, risks triggering the same problems that plagued the *Lemon*/endorsement line of cases. By hinging the First Amendment rights of students on the impressions of a third-party observer, the "children's game" played by *Lemon* would be played again against free speech, simply on a different board. *See Shurtleff*, 596 U.S. at 279 (Alito, J., concurring).

How much should reasonable observers be expected to know about school policy? How much should they be expected to know about the legal protection offered to student speech? What might observers consider "controversial"? In the instant case, if an observer is treated as knowing that the school does not design the club posters, the posters might not be said to reasonably bear the imprimatur of the school. *See E.D. v. Noblesville Sch. Dist.*, 151 F.4th 907, 911-12 (7th Cir. 2025). The inevitable result of such a standard is that what would otherwise be legitimate First Amendment expression is unfairly prohibited—a twisting of this Court's First Amendment's precedents that cries out for this Court's review. *See e.g. Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002) (applying *Kuhlmeier* to prohibit student-painted memorial tiles at Columbine High School that included religious commiserations and symbols); *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005) (applying *Kuhlmeier* to a kindergartner's classroom poster about saving the environment that included an image of Jesus); *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 280 (3d Cir. 2003) (applying *Kuhlmeier* to prohibit an elementary student's distribution of religious items—pencils with "Jesus Loves the Little Children"—during a school party because it "could appear to bear the school's seal of approval.").

These applications of *Kuhlmeier* fail to recognize what this Court has made clear, that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250. They also create a *de facto* heckler's veto (or "observer's veto") wherein any theoretical passerby can effectively be leveraged to censor permissible First Amendment speech simply by positing that the communication appears to that hypothetical person to be government speech—even when the speech is purely the product of students, not school officials. This is the paradigm which an extension of *Kuhlmeier* would, in practice, enable.

Indeed, as Justice Alito explained in *Shurtleff*:

> Ultimately, *Lemon* devolved into a kind of children's game. Start with a Christmas scene, a menorah, or a flag. Then pick your own "reasonable observer" avatar. In this game, the avatar's default settings are lazy, uninformed about history, and not particularly inclined to legal research. His default mood is irritable. To play, expose your avatar to the display and ask for his reaction. How does he feel about it? Mind you: Don't ask him whether the proposed display actually amounts to an establishment of religion. Just ask him if he feels it "endorses" religion. If so, game over.

Shurtleff v. City of Boston, 596 U.S. 243, 279 (2022) (concurrence). This passage captures the essential arbitrariness of observer-perception tests: the outcome depends not on law or fact, but on the mood and assumptions of a fictional construct. After

decades of this "children's game" and its repeated revisions, criticisms, burial, and resurrections, *Lemon* was laid to its final rest in *Kennedy*. It should not continue to stalk children, now in the context of free speech. *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., joined by Thomas, J., concurring in judgment).

B. The Imprimatur Test Should, Like the "Reasonable Observer" Test, Be Abandoned or Confined to Facts Closely Analogous to *Kuhlmeier*.

The discarding of the *Lemon* "reasonable observer" test illustrates that tying First Amendment rights predominantly to the perception of the passing individual is highly disfavored. While *Kuhlmeier* employed a version of the test in the understandable context of a school (government) run speech production program, the rule for that specific context should not extend more broadly to restrict free speech rights. While this Court in *Shurtleff* noted that public perception of a communication may be a factor for consideration, the Court sharply constrained any role for such public perception:

> Our earlier government-speech precedents recognized that "the correct focus" of the government-speech inquiry "is *not* on whether the . . . reasonable *viewer* would identify the speech as the government's," *Johanns v. Livestock Marketing Assn.*, 544 U. S. 550, 564, n.7 (2005), *and with good reason*. Unless the public is assumed to be omniscient, *public perception cannot be relevant to whether the government is speaking, as opposed merely appearing to speak*. Focusing on public perception encourages courts to categorize

> private expression as government speech in circumstances in which the public is liable to misattribute that speech to the government.

596 U.S. at 265-66 (emphasis added).

Matal v. Tam, 582 U.S. 218 (2017), likewise exemplifies disregard of "public perception" as a basis for restricting speech. In *Matal*, a band attempted to trademark the use of a racial slur as its band name. *Id.* at 223. The trademark was rejected so as not to violate the Lanham Act's "disparagement clause" which prohibited the trademarking of marks that would disparage groups of people on the basis of race. *See id.* at 228-30. As part of its defense, the government claimed that trademarks counted as *government speech* and it therefore had discretionary power to trademark a racial epithet or not. *Id.* at 234. In the Court's discussion of whether approval of a trademark qualifies as government speech, the only reference to public perception was when the Court wrote "it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means." *Id.* at 237 (internal citation omitted). The Court did not elaborate any further.

If public perception was a highly dispositive factor in determining government speech, surely the Court would have expended more than a single sentence on the topic. But, as in *Shurtleff*, the Court focused on actual fact instead of public perception. It noted how the Patent and Trademark Office had definitively stated that approval of a trademark did not create a government imprimatur on the content of the mark. *Id.* at 235. Indeed, the Court recognized the danger that "[i]f private speech could be passed off as government speech by simply affixing a government

seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Id*. The Court placed heavy weight on the fact that the government has limited discretion on what trademarks to deny. *Id*. ("if the mark meets . . . viewpoint-neutral requirements, registration is mandatory"). Moreover, "[t]rademarks have not traditionally been used to convey a Government message." *Id*. at 238. Also, the government did "not dream up these marks, and it does not edit marks submitted for registration." *Id*. at 235. Therefore, the Court rightly held that—despite receiving government approval and protection—trademarks could not be considered anything other than private speech. *Id*. at 239.

Matal and *Shurtleff* thereby follow the roadmap this Court drew in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). In that case, the Court embraced a factual and historical approach, rather than flagging public perception as a potentially decisive consideration. In *Summum*, a local religious group petitioned the government of Pleasant Grove to erect in a local park a monument featuring its core teachings. *Id*. at 465-66. This park was already home to other monuments, including one of the Ten Commandments. *Id*. at 465. The Court held that the government was within its discretion to reject the proposed monument, as the erection and maintenance of monuments (even privately donated ones) reflected the message the local government sought to convey – i.e., the monuments were a form of government speech. *Id*. at 481.

The Court began with a historical analysis: "governments have long used monuments to speak to

the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power." *Id.* at 470. And, just as government-commissioned monuments express government speech, so are donated monuments which the government elects to accept. *See id.* at 470-71. Public perception, to the extent relevant, only confirmed the common sense of the matter: "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land. City parks . . . play an important role in defining the identity that a city projects to its own residents and to the outside world." *Id.* at 472. In other words, there is an obvious difference between a permanent monument in a park (government speech) and a temporary gathering of private persons, say to hold a rally (private speech). In the same way, here there is an obvious difference between an official school outlet (the paper in *Kuhlmeier*) and a student-initiated event. The government in *Summum* accepted or rejected possible donations of monuments based on "such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* at 472. So—just as in *Shurtleff* and *Matal*—while public perception was not entirely excluded from consideration, of far greater importance was whether the government was in fact facilitating its own speech.

While *Shurtleff*, *Matal*, and *Summum* acknowledge public perception as a factor, the key inquiry in all three cases was whether the government itself was speaking. This inquiry is far more definite and administrable than a public perception test. Is the

manner or form in which the speech takes place one which is traditionally associated with the government communicating with its citizenry? *See Shurtleff*, 596 U.S. at 252; *Matal*, 582 U.S. at 238; *Summum*, 555 U.S. at 470 (2009). If so, it favors considering the speech to be government speech. To what extent does the government design or editorialize the contents of the speech? *See Shurtleff*, 596 U.S. at 252; *Matal*, 582 U.S. at 235. If it does exercise significant design or editorial control, that is another factor leaning towards considering the speech to be government speech. Does the government show evidence of accepting or rejecting the promotion of the speech of citizens based on its content, like a homeowner choosing decorative features? *See Shurtleff*, 596 U.S. at 252; *Summum*, 555 U.S. at 472. Again, if so, it is more likely that the speech is government speech. These factors all go towards answering what should be the only salient question. Not "would an observer think the government is speaking?" But rather, "is the government in fact speaking?" This line of inquiry is far more reliable—and protective of the First Amendment rights of students—than a distorted extension of *Kuhlmeier*.

This is not to say that *Kuhlmeier* itself should be overturned. Its result remains sound on its facts, as the school newspaper there would qualify as government speech under the factors identified above. But the lower court in the present case placed erroneous emphasis on observer perception as the primary or dispositive factor. That misstatement of constitutional law warrants this Court's review.

II. THE CLUB POSTERS CANNOT BE CONSIDERED GOVERNMENT SPEECH.

The club posters at issue are not school speech under the framework this Court has developed for distinguishing government speech from private expression. In *Shurtleff*, *Matal*, and *Summum*, this Court identified several factors for determining whether speech is that of the government or of a private party: the history of the form of expression at issue, the extent to which the government has actively shaped or controlled the expression, and whether the government exercises meaningful editorial discretion over the content. *See Shurtleff*, 596 U.S. at 252. Applying each of these factors to the instant case, the conclusion is clear: the club posters are private student speech, not school speech.

First, as to history: student interest club flyers are not a medium traditionally associated with the school communicating its own institutional message. Unlike a school newspaper produced within a journalism curriculum, or a school-produced play, or an official school publication, a poster advertising a student-initiated club's meeting is the student's own handiwork. Schools have not historically used student club flyers as vehicles for transmitting an institutional message in the way that governments have historically used monuments, *see Summum*, 555 U.S. at 470, or flags, *see Shurtleff*, 596 U.S. at 252. The historical practice thus weighs heavily against treating the posters as school speech.

Second, as to government control over the expression: the school did not design, draft, or editorialize the contents of E.D.'s or any other student's posters and had "no formal written policy

governing the content of flyers for student interest clubs, beyond the general guidance in the 2021-2022 NHS Student Handbook." *Noblesville*, 151 F.4th at 911. This handbook only specified time, place, and manner rules: that posters be posted only in designated areas, be taken down after the date of the event, and be used only to advertise a school-sponsored event or have administrative approval. *Id.* at 911-12. In *Matal*, the Court placed great weight on the fact that the government "does not dream up these marks, and it does not edit marks submitted for registration." 582 U.S. at 235. The same is true here. The school did not conceive of the posters, did not compose their content, and did not direct their message. Rather, the school's own principal acknowledged that student interest clubs are "100% student driven and can have no involvement from any adult." *Noblesville*, 151 F.4th at 913.

The poster approval process, such as it was, involved no substantive editorial judgment—merely a cursory administrative sign-off with no written standards to guide it. This cursory review is not endorsement: "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250. Similarly, the Court in *Matal* warned that "if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal*, 582 U.S. at 235. That is precisely the danger presented by the Seventh Circuit's reasoning below.

Third, as to meaningful editorial discretion: in *Summum*, the government's acceptance or rejection of

monuments was based on "content-based factors as esthetics, history, and local culture," and this deliberate, substantive selectivity was a key reason the Court found the monuments to be government speech. *Summum*, 555 U.S. at 472. In *Shurtleff*, by contrast, the city's "lack of meaningful involvement in the selection of flags or the crafting of their messages" led the Court to classify the flag raisings as private speech. *Shurtleff*, 596 U.S. at 258. The Noblesville poster approval process far more closely resembles Boston's rubber-stamp flag approvals than Pleasant Grove's curation of its monuments. The school exercised no substantive editorial discretion: it had no written content standards. True, the record reflects that different administrators applied different, unwritten criteria to the same approval process. But inconsistent, standardless processing is not meaningful editorial control, it is just inconsistent processing. The posters were plainly private speech, not government speech.

These three factors all speak to one clear conclusion: the school is not in fact speaking. Even if a passerby might be "likely," *see Shurtleff*, 596 U.S. at 255, to perceive the posters as school speech – which would be counterintuitive -- the school has not actually spoken. It has merely allowed students a space to advertise for their clubs, and the contents of those advertisements ought to be protected First Amendment speech.

III. THE DECISION BELOW IS NOT EVEN CONSISTENT WITH *KUHLMEIER*.

The Seventh Circuit below relied heavily upon *Kuhlmeier*, as discussed above. But the decision below

conflicts with *Kuhlmeier,* providing an additional reason for this Court to grant review.

In *Kuhlmeier*, two articles on teen pregnancy and the effects of divorce respectively were submitted for publication in a school newspaper that was run as part of a journalism class. *Kuhlmeier*, 484 U.S. at 262-64. The school did not allow either article to be published. *Id*. at 263. The teen pregnancy article was rejected for privacy reasons: it interviewed and discussed a number of students from the school itself, and the school was concerned those students could be identified from the article despite their names being changed. *Id*. There was also a concern with the maturity of the topic, namely, that discussions of sexual activity and birth control would be inappropriate for the wider student body. *Id*. A third consideration was that the divorce article contained potentially embarrassing comments about some of the students' divorced parents, and the school thought the parents ought to be made aware and have an opportunity to consent to the publication first. *Id*.

As discussed *supra*, the relevant medium in *Kuhlmeier* was a school-organized, school-directed program. The paper was published as a part of a specific journalism class which was taught daily. *Id*. at 262. The students received academic credit for participating in the class, *id*. at 268, and its teacher regularly reviewed proofs and exercised editorial authority over the articles to be published. *Id*. at 268. The principal of the school also reviewed the articles for publication. *Id*. The Board of Education also provided funds for the paper, which totaled $4,668.50

in 1982-1983.[2] *Id*. at 262. Together, the extensive level of control maintained by the school, the amount of funding given to the newspaper, and the use of the paper in a class for which students received academic credit, all denoted school authority over the composition and shaping of the ultimate message, just as a private newspaper editor retains ultimate authority over the articles in that paper.

The present case is completely different. The posters were not the product of any class, nor were they drafted under faculty supervision. They were not reviewed by an instructor as part of a pedagogical exercise, nor did students receive any academic credit for either the clubs or designing posters. The flyers were designed and produced entirely by students, for a student-initiated club, to advertise that club's own after-school activities. This is private speech. While the Establishment Clause does prohibit a public school from endorsing religion, private speech, even "private speech endorsing religion," enjoys double protection from the Free Speech and Free Exercise Clause. *Cf. Mergens*, 496 U.S. at 250. The facts in *Kuhlmeier* are also highly distinguishable from the much more expansive applications of *Kuhlmeier* by lower courts since it was decided. *See e.g.*, *Fleming*, 298 F.3d 918; *Peck*, 426 F.3d 617; and *Walz*, 342 F.3d 271. Indeed, it is difficult to imagine a situation more factually distinguishable than the instant case itself. To read *Kuhlmeier*'s reference to public perception as a warrant to ignore decisively different facts is therefore a grave distortion of *Kuhlmeier*.

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[2] The modern-day equivalent would be $15,735.12. *Inflation Calculator*, U.S. INFLATION CALCULATOR, www.usinflationcalculator.com/ (last visited Feb. 11, 2026).

The first prong of *Kuhlmeier*'s analysis is whether E.D.'s posters would cause a member of the public to reasonably perceive them as bearing "the imprimatur of the school." *Kuhlmeier*, 484 U.S. at 271. The posters plainly enjoy no such imprimatur. For a reasonable observer to perceive the flyers as school speech, the observer would have to believe the school was advocating a host of conflicting messages. It might be promoting band club which takes place at the same time as the chess club. It would have to be equally supportive of the young Democrats club as the young Republicans club. It might recommend a religious club or an atheist club. A cursory consideration of the diversity of voices itself plainly suggests that the school was not itself speaking but rather hosting a space in which *students* could themselves advertise for their own clubs. Moreover, if the reasonable observer were a student—the one most likely to be viewing the posters—that student would know that the clubs are student-run and student-promoted. There would be no danger of thinking the school was itself promulgating a message.

But even if this Court were to reach *Kuhlmeier*'s second factor, the school's restriction of E.D.'s posters was not "reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 273. In *Kuhlmeier*, the school's decision to withhold the articles was grounded in concrete pedagogical and student-welfare concerns: protecting the privacy of the students, shielding younger students from material on sexual activity and birth control, and ensuring that parents named in the divorce article had an opportunity to consent or object to publication. *Id.* at 263–64. These were specific, articulable reasons tied to the school's

educational mission and its duty of care. No comparable justification exists here.

Finally, in order for a pedagogical concern to be implicated outside of a classroom, the activities in question must be "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271. The only faculty supervision involved with the clubs or posters were "the use of school facilities and [to] provide logistical support." *Noblesville*, 151 F.4th at 911. The posters themselves cannot be said to impart "particular knowledge or skills" within any curricular framework. They were student-created advertisements identifying a club's name, mission, and meeting information—not instrumental materials, not faculty-supervised academic exercises, and not connected to any course of study.

* * *

CONCLUSION

The decision below embraces a perception-based test that this Court has repeatedly and correctly disfavored, but which lower courts have likewise adopted, warranting this Court's review. The student club posters at issue are private speech by every measure that matters: the school did not conceive them, did not write them, does not edit them, and exercises no meaningful discretion over their content. A standard that would nonetheless classify them as government speech—and thereby permit their suppression—is one that renders First Amendment rights contingent on hypothetical passersby. That is not the law, and it should not be. The Court should take this opportunity to clarify that the proper inquiry in school speech cases, as in government speech cases generally, is whether the government is in fact speaking. This Court should grant review and reverse.

Respectfully submitted,

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